No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE UNIVERSITY FACULTY FOR LIFE AND TEXAS ALLIANCE FOR LIFE TRUST FUND IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Is the evidence in the record of this case sufficient to prove, by a preponderance of the evidence, that House Bill 2 will unduly burden a "large fraction" of the State's abortion patients?

2. Does the doctrine of res judicata preclude the plaintiffs' facial challenges to House Bill 2's provisions?

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INTEREST OF AMICI[1]

University Faculty for Life (UFL), founded in 1989, comprises more than 400 faculty members from 80 colleges and universities in the United States. UFL encourages scholarly research on bioethical and social-science

[1] All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amici curiae, their members, or their counsel financed the preparation or submission or this brief.

issues and seeks to ensure that public policy on abortion is grounded on current and reliable scientific, medical, philosophical, and other scholarly information. In this case, UFL seeks to ensure that the Court's decision is based on an accurate understanding of the evidence and the trial record in this case.

Texas Alliance for Life Trust Fund (TALTF) is committed to preserving and protecting human life through education and promoting compassionate alternatives to abortion.

The purpose of this amicus brief is to provide a careful and detailed refutation of the inaccurate, misleading, and unsupported factual claims that appear throughout the plaintiffs' brief. The State has denied each of these claims, but this amicus will explain in detail how the plaintiffs have misrepresented the record and the effects of HB2.

SUMMARY OF ARGUMENT

Litigants challenging an abortion regulation must produce evidence in the record showing that the law will impose an "undue burden" on abortion patients. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) ("[T]here is no evidence on this record that . . the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion . . . ."). The evidence that the plaintiffs produced at trial was insufficient to warrant statewide invalidation of the ASC or admitting-privileges requirements—as the fifth circuit correctly held. Pet. App. 1a–76a.

Now the plaintiffs are trying to buttress their factual case by relying on inaccurate and misleading characteri-

zations of the record, factual assertions that have no evidentiary support, and unsworn hearsay that was never introduced at trial and never subjected to discovery or cross-examination. *See, e.g.*, Pet. Br. 20 n.11, 27–28 nn.15–16 (newspaper articles); Pet. Br. 21 (law-review article never introduced at trial). The most outlandish is the plaintiffs' reliance on a post-trial study conducted by their trial expert that claims to have discovered that some abortion clinics in Texas have waiting times to get an appointment. Pet. Br. 25–26 (citing study conducted by Texas Policy Evaluation Project). This study is inadmissible hearsay—the State has had no opportunity to take discovery or cross-examine its authors—and it has no place in an appellate brief. *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* 743, 801 (10th ed. 2013) ("It is manifestly improper to bring such [non-record] facts to the Court's attention, either by brief or oral argument, to induce the Court to make a favorable disposition of the case.").

The Court should also bear in mind that the plaintiffs made inaccurate statements and false predictions to this Court in their previous lawsuit challenging HB2's admitting-privileges requirement. When the plaintiffs sought emergency relief and asked this Court to block the admitting-privileges law from taking effect, the plaintiffs insisted that the law "will prevent" 20,000 Texas women from obtaining abortions each year. *See* Emergency Application to Vacate Stay at 2, 8, n.4 *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 4, 2013). They also claimed that the admitting-privileges law would force the ASC clinics in

Austin and Fort Worth to close their doors, as well as the non-ASC clinic in Killeen. *See id.* at 7–8. Yet all three clinics managed to comply with HB2's admitting-privileges requirement after the law took effect—and the trial evidence in this case has disproven the plaintiffs' previous claim that the admitting-privileges law "will prevent" 20,000 Texas women from obtaining abortions. J.A. 401, 415; Pet. Br. App 1; *infra* at 32–34. The plaintiffs' current claims about the effects of HB2 should be met with a skeptical judicial eye and a demand for supporting evidence.

ARGUMENT

I. THE PLAINTIFFS' PRESENTATION OF THE FACTS IS INACCURATE AND MISLEADING

The State has denied every single one of the plaintiffs' factual claims, Resp. Br. 9–14, and this Court must resolve each of these factual disputes based on the evidence in the record.

This is an unusual role for the Court, which typically sits to resolve questions of law, rather than competing factual assertions based on voluminous trial materials. *See* Sup. Ct. R. 10. To adjudicate the plaintiffs' undue-burden claims, the Court will have to resolve each of the following factual disputes between the parties:

> (1) The plaintiffs claim that HB2 will "close more than 75% of Texas abortion facilities." Pet. Br. 3. The State denies this, Resp. Br. 13–14, and the district court made no finding of fact on this question. Pet. App. 128a–154a.

(2) The plaintiffs claim that HB2's admitting-privileges law caused more than half of Texas's abortion facilities to close. Pet. Br. 3. The State denies this, Resp. Br. 11–13, and the district court made no finding of fact on this question. Pet. App. 29a, 128a–154a.

(3) The plaintiffs claim that the State "stipulated that the ASC requirement would cause all of the licensed abortion facilities to close." Pet. Br. 6. The State denies this, Resp. Br. 10 n.3, and the court of appeals rejected the plaintiffs' characterization of the stipulation. Pet. App. 29 n.15.

(4) The plaintiffs claim that HB2's ASC requirement will force all non-ASC clinics to close. Pet. Br. 6. The State denies this, noting that nothing prevents the non-ASC clinics from buying or leasing one of the 433 licensed ASCs in Texas or building their own ASC. Resp. Br. 10 n.3. The court of appeals found that "it is indeed possible for abortion providers to comply with the ASC requirement." Pet. App. 29 n.15.

(5) The plaintiffs claim that *every* requirement in the State's ASC rules violates the Constitution. Pet. Br. 6–8. The State denies this, Resp. Br. 51–53, noting that the ASC rules are severable and that many provisions cannot conceivably impose an undue burden on abortion patients. *See, e.g.*, 25 Tex. Admin. Code § 135.5(a) ("Patients shall be treated with respect, con-

sideration, and dignity."); *id.* § 135.52(e)(1)(F) ("A liquid or foam soap dispenser shall be located at each hand washing facility."). The court of appeals agreed with the State that the rules are severable and that the plaintiffs failed to produce any evidence that the operational requirements in the State's ASC rules had the purpose or effect of unduly burdening abortion. Pet. App. 30a; 116a–117a.

(6) The plaintiffs claim that HB2's admitting-privileges law forced abortion clinics to "operate at diminished capacity." Pet. Br. 23. The State denies this, Resp. Br. 9–10, and the court of appeals held that "the record lacks any actual evidence" on the capacity of Texas abortion clinics. Pet. App. 105a–106a.

(7) The plaintiffs claim that HB2's admitting-privileges law has prevented women from obtaining abortions. Pet. Br. 3. The State denies this, Resp. Br. 9 & n.2, and the district court made no finding of fact on this question. Pet. App. 128a–154a.

(8) The plaintiffs claim that the State's ASC rules treat abortion clinics differently from other ASCs by refusing to consider "waivers from DSHS." Pet. Br. 7. The State denies this, Resp. Br. 4–5, and the court of appeals held that "ASCs that provide abortions are treated no differently than any other ASC." Pet. App. 45a.

The plaintiffs bear the burden of proof on each of these eight disputed questions of fact. And they must produce evidence in the record that shows, by a preponderance of the evidence, that their factual assertions are correct.

But the plaintiffs cannot carry their burden of proof on any of these eight disputed factual questions. Many of the plaintiffs' claims are demonstrably false; others are unsupported by *any* evidence in the record. The plaintiffs could not even survive a motion for summary judgment on these factual claims.

A. The Plaintiffs' Claim That HB2 Will "Close More Than 75% Of Texas Abortion Facilities" Is False

The plaintiffs' claim that HB2 will "close more than 75% of Texas abortion facilities" is patently untrue. Pet. Br. 3; *id.* at 25 (same claim). The plaintiffs do not tell this Court how they obtained this "more than 75%" number. But the map in their appendix suggests that they started with the number of abortion clinics that existed on October 30, 2012—one year *before* HB2 took effect—and assumed that HB2 has caused or will cause every non-ASC abortion provider to close. Pet. Br. App.

The plaintiffs' claim is false because at least ten of the State's abortion clinics closed for reasons having nothing to do with HB2, and those clinics would have closed even if HB2 had never been enacted.

Two of the clinics—Abilene and Sugar Land—closed months before HB2 was even signed. The Abilene clinic ("Planned Parenthood Choice") closed in November 2012, eight months before the governor signed HB2 and one year before the admitting-privileges law took effect.

The Sugar Land clinic ("KNS Medical") closed on February 28, 2013, also months before HB2 was signed and took effect. Yet the plaintiffs include each of these clinics—whose closures long pre-date HB2 and had nothing to do with HB2—in their map of clinics "impact[ed]" by HB2. Pet. Br. App 1.[2]

Six more clinics—College Station, Lubbock, Midland, San Angelo, Stafford, and All Women's Medical Center in San Antonio—closed after HB2 was signed but *before* the admitting-privileges requirement took effect on October 31, 2013. Five of those clinics (College Station, Midland, San Angelo, Stafford, and All Women's Medical Center in San Antonio) closed before Planned Parenthood and the petitioners filed their first lawsuit challenging the admitting-privileges requirement on September 27, 2013. The Lubbock clinic closed after the first lawsuit was filed but before the admitting-privileges law took effect, and it withdrew from the lawsuit. *See* Emergency Application to Vacate Stay at 7 n.3, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 4, 2013) ("Planned Parenthood Women's Health Center has withdrawn from this litigation, and it is Applicants' understanding

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[2] The plaintiffs' efforts to mislead the Court are best captured in the following sentence: "Before HB2, there were more than 40 facilities providing abortion in Texas, spread throughout the State." Pet. Br. 23. The plaintiffs do not tell the Court that they are measuring the number of clinics that existed *months* before HB took effect, and including clinics that closed for reasons unrelated to HB2.

that abortion services will not be available in Lubbock even if this application is granted.").

All of these closures are unrelated to HB2's admitting-privileges law, and the plaintiffs told this Court as much when they sought emergency relief from HB2 on November 4, 2013. The plaintiffs' emergency application acknowledged that the Lubbock clinic had closed and would not reopen. *Id.* at 7 n.3.[3] And when the plaintiffs listed the abortion providers that had closed in response to the fifth circuit's decision allowing HB2 to take immediate effect, they omitted any mention of Abilene, College Station, Lubbock, Midland, San Angelo, Sugar Land, or Stafford—even as they purported to provide an exhaustive list of the clinics that had closed in response to the State's admitting-privileges law. *Id.* at 7–8. The plaintiffs had to omit those clinics from their list because those clinics had already closed for reasons unrelated to the admitting-privileges requirement—and would remain closed if the admitting-privileges law were enjoined. Now, the plaintiffs are telling this Court that

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[3] The plaintiffs did not tell the court why the Lubbock clinic had closed, but the State's response cited news reports that Planned Parenthood Women's Health Center was subsumed by Generation Covenant in an asset purchase on October 30, 2013, and that Generation Covenant does not perform abortions. *See* Memorandum in Opposition to Emergency Application to Vacate Stay at 25, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 12, 2013).

every abortion clinic that closed *before and after* HB2 took effect was forced to close by HB2. Pet. Br. 3.[4]

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[4] The plaintiffs suggest that "some" unspecified clinics that closed *before* HB2's requirements took effect did so because they "[knew] that they would not be able to comply with the challenged requirements" and therefore decided not to renew their licenses or pay their assessment fees. Pet. Br. 23 n.12. There is no evidence in the record to support that claim with respect to *any* clinic that closed before HB2's admitting-privileges law took effect, and it is obviously false with respect to Abilene and Sugar Land—which closed months before HB2 was even signed into law. It also false with respect to Lubbock; the plaintiffs admitted in their emergency application that the Lubbock clinic would remain closed even if the admitting-privileges requirement were enjoined. *See* Emergency Application to Vacate Stay at 7 n.3, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 4, 2013). And the plaintiffs have produced no evidence that the pre-HB2 closures in College Station, Midland, San Angelo, Stafford, or at All Women's Medical Center in San Antonio were caused by HB2. The testimony in the joint appendix that they cite claims only that the Killeen Women's Health Center decided to close in June of 2014 because of the pending *ASC* requirement, which was scheduled to take effect on September 1, 2014. J.A. 339–40, 403.

The plaintiffs bear the burden of proof, so they must produce evidence in the record showing that HB2 caused the pre-HB2 clinic closures—but no such evidence exists. And the district court made no finding that the pre-HB2 closures were caused by HB2. Pet. App. 138a (noting only that the number of abortion clinics "dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013"); Pet. App. 29a ("[T]he district court did not discuss whether some of these clinics may have closed for reasons unrelated to H.B.2.").

Finally, at least three more clinics—Beaumont, Killeen, and Corpus Christi—were open after the admitting-privileges law took effect, but are closed today. They did not close because of HB2's admitting-privileges requirement, because the doctors at those clinics *had* privileges. J.A. 401 ("Q. That clinic, the Killeen clinic, at the time of its closure met the admitting privileges requirement in House Bill 2; is that correct? A: Yes.");[5] J.A. 832–33 ("Q. Ms. Hagstrom-Miller, when did Whole Woman's Health Beaumont close? A. We closed, I believe it was, March 6th, 2014. Q. And at that time, there were physicians providing abortion services at Whole Woman's Health in Beaumont who had admitting privileges; is that right? A. Correct."). Yet each of those clinics closed well before the ASC requirement was scheduled to take effect—and they remain closed even though the ASC requirement has been enjoined for 17 months. There is no evidence in the record explaining why the Beaumont

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[5] The plaintiffs, by the way, told this Court in the previous HB2 lawsuit that the Killeen clinic would be forced to close if this Court allowed the admitting-privileges law were allowed to take effect—because its doctors would be unable to secure the required admitting privileges. *See* Emergency Application to Vacate Stay at 8, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 4, 2013) ("All of the licensed facilities providing earlier abortions, i.e., non-ASCs, in Waco, Fort Worth, *Killeen*, McAllen, and Harlingen, will also cease providing abortions, thereby eliminating all abortion access in those cities.") emphasis added)). It turned out that the Killeen clinic was perfectly able to comply with the State's admitting-privileges rule—notwithstanding the plaintiffs' representations to this Court. *See also infra*, at 33–34.

and Corpus Christi clinics closed.[6] As for Killeen, Dr. Lendol Davis testified that he chose to close the clinic in June 2014 rather than pay the licensing fee—but he has *chosen* to keep the clinic closed for nearly two years even though the ASC requirement has been enjoined. J.A. 401 ("Q. If your clinic was willing to pay the licensing fee, that clinic would be open today; is that correct? A. Yes."). Davis *could* have kept his clinic open during the entirety of this litigation—as the other non-ASC abortion clinics have done. It is not HB2 that has kept the Killeen clinic closed, but Davis's choice not to pay the licensing fee.

Nothing in HB2 is stopping the clinics in Beaumont, Killeen, and Corpus Christi from resuming operations. Because the plaintiffs bear the burden of proof—and they have not produced evidence (and there is no district-court finding) that HB2 caused either the Beaumont or Corpus Christi clinics to close—this Court *must* assume that these two abortion clinics (plus the eight that closed before the admitting-privileges law took effect) would have closed even if HB2 had never been enacted. The plaintiffs bear the burden of proof, and they cannot ask courts to assume facts that have not been proven with evidence.

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[6] A newspaper reported that the Corpus Christi clinic closed because the doctor retired, but there is nothing *in the record* about why the clinic closed. *See infra*, at 14.

B. The Plaintiffs' Claim That The Admitting-Privileges Law Caused More Than Half Of Texas Abortion Clinics To Close Is False

The plaintiffs' claim that "more than half of these facilities are currently closed because the admitting-privileges requirement is largely in effect" is also inaccurate. Pet. Br. 3. It is instructive to compare this statement with the carefully crafted statement that appears on page 23 of their brief: "*Leading up to and following* implementation of the admitting-privileges requirement on October 31, 2013, the total number of facilities *dropped* by nearly half." Pet. Br. 23 (emphasis added). The second statement describes mere correlation. The first statement insists that each closure occurred "because" of the admitting-requirement—and it is patently untrue.

The closures that occurred in the period "leading up to" the implementation of the admitting-privileges requirement were not *caused* by the admitting-privileges law. The Abilene and Sugar Land clinics closed before HB2 was even enacted, and the plaintiffs admitted in the previous litigation that the Lubbock clinic closure had nothing to do with the admitting-privileges requirement. *See* Emergency Application to Vacate Stay at 7 n.3, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 4, 2013). The clinics in College Station, Lubbock, Midland, San Angelo, Stafford, and All Women's Medical Center in San Antonio likewise closed before the admitting-privileges law took effect and for reasons unrelated to the law. *See supra*, at 8–9.

The clinics in Beaumont, Killeen, and Corpus Christi closed well after the admitting-privileges law took effect—and the plaintiffs' witnesses testified that the Beaumont and Killeen clinics *complied* with the admitting-privileges requirement and that it had nothing to do with their closures. J.A. 401, 833. There is no evidence in the record about why the Corpus Christi clinic closed, but newspapers reported that the clinic closed because the doctor—who held the required hospital admitting privileges—retired "for medical reasons." *See* Melissa Fletcher Stoeltje, *Abortion Clinic Closes in Corpus Christi*, San Antonio Express-News (June 10, 2014), http://bit.ly/1lsAu50 (last visited Jan. 26, 2016). That report is obviously outside the record, but there is nothing *inside* the record showing that the Corpus Christi clinic closed because of anything in HB2—much less that it closed because of the admitting-privileges law.

Worse, there is no evidence in the record showing that the admitting-privileges law caused *any* abortion clinic in Texas to close—other than the clinics in McAllen and El Paso on which the plaintiffs sought as-applied relief. The reason for this lack of record evidence is obvious: The plaintiffs did not bring a facial challenge to the admitting-privileges requirement, which they had litigated and lost in the previous HB2 lawsuit, and which was clearly barred by res judicata. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014).

Instead, the plaintiffs requested *only* as-applied relief to avoid a res judicata dismissal—so they never developed a factual record on the statewide effects of the

admitting-privileges requirement. Now, the plaintiffs want this Court simply to *assume* that every clinic that closed between October 2012 and today close because of the admitting-privileges law—even though they produced no evidence on this point, the district court made no finding,[7] and the claim is untenable on its face.

C. The State Never Stipulated That HB2's ASC Requirement Would Force The Non-ASC Abortion Clinics To Close

The plaintiffs are also wrong to say that the State "stipulated" that the ASC requirements would cause all of the non-ASC abortion clinics to close. Pet. Br. 6, 40. The State made no such stipulation, and the stipulation that it *did* make was carefully worded to avoid conceding that the non-ASC clinics would "close" or cease offering abortion services:

> *No facility licensed by the State of Texas as an abortion facility* currently satisfies the ASC requirement of HB 2. As a result, each of *these facilities* will be prohibited from providing abortion services effective September 1, 2014.

J.A. 183–84 (emphases added).

The parties stipulated only that currently licensed abortion clinics would be unable to perform abortions *at their currently licensed abortion facility*. The parties

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[7] *See* Pet. App. 138a (noting only that the number of abortion clinics dropped, not that HB2's admitting-privileges requirement caused any of them to close).

did *not* stipulate that currently licensed abortion facilities would be unable to continue providing abortions by buying, building, or leasing space at a licensed ASC. Resp. Br. 10 n.3. And any of the State's non-ASC abortion clinics can remain in business by buying or leasing space in one of the 433 licensed ASCs in Texas[8]—or by building an ASC abortion clinic (as Planned Parenthood has done).

The court of appeals specifically rejected the plaintiffs' characterization of the stipulation. Pet. App. 29a n.15. ("The State points out that it did not stipulate that only eight abortion facilities would remain in Texas, arguing that currently licensed abortion facilities that do not comply with the ASC requirement might buy, build, or lease a licensed ASC."). The plaintiffs have not challenged the court of appeals' characterization of the stipulation, opting instead to simply assert (in the teeth of the court of appeals' ruling) that the State had stipulated that the non-ASC clinics would close rather than relocate.

D. The Plaintiffs' Claim That HB2's ASC Requirement Will Force All Of The State's Non-ASC Clinics To Close Is Unsupported By Any Evidence

There is no evidence in the record to show that all of the State's non-ASC abortion clinics will close rather

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[8] Abortions in Texas may be performed at any licensed ambulatory surgical center, and it need not be licensed as an abortion facility to perform abortions. *See* Tex. Health & Safety Code § 245.004(a)(3).

than relocate in response to HB2's ASC requirement. The plaintiffs have wanted courts simply to *assume* that every non-ASC abortion provider in Texas will go out of business rather than move into an HB2-compliant building. But the plaintiffs bear the burden of proof, and they must *prove* (and not simply assert) that these non-ASC clinics will choose to close rather than relocate in response to the State's ASC rule. Most of the State's abortion providers were not even parties to this lawsuit. And the plaintiffs introduced no evidence of whether these non-party abortion providers plan to buy, build, or lease an ASC.

In addition, there was testimony that all three of the plaintiff clinics were considering opening new ASCs if their lawsuit failed:

> Q. . . You and your wife recently purchased a $1.125 million building here in Austin in May; is that correct?
>
> A. Yes.
>
> Q. . It was purchased with the intent to convert it into an ASC that complies with House Bill 2; is that right?
>
> A. Yes.
>
> Q. And you intend for that ASC—when you purchased it, you intended for that ASC to provide abortion services?
>
> A. Yes.

J.A. 402.

> Q. And so now Dr. Aquino and Dr. Braid are planning to open the ambulatory surgical center in San Antonio?
>
> A. They hope to be able to do so, yes.

J.A. 738. The court of appeals noted this testimony and rejected the plaintiffs' claim that HB2 will force all non-ASC abortion clinics to close rather than relocate. Pet. App. 29a n.15.

The plaintiffs cannot point to any evidence in the record showing that non-ASC abortion clinics will close rather than relocate in response to HB2's ASC requirement. Instead, the plaintiffs hang their hat on the stipulation—but the stipulation does not say that the non-ASC clinics will close, only that they will be unable to continue offering services in their current buildings. Pet. App. 29a n.15.

E. The Plaintiffs Have Failed To Prove That Each Of The State's Discrete And Severable ASC Requirements Violates The Constitution

The plaintiffs claim that *every* provision in the State's ASC rules will "unduly burden" abortion patients. Pet. Br. 6–7. But the State's ASC regulations impose a variety of different requirements, each of which is severable from the others:

> Consistent with the intent of the Legislature, the department intends, that with respect to the application of this chapter to each woman who seeks or obtains services from a facility licensed under this chapter, every provision, sec-

> tion, subsection, sentence, clause, phrase, or word in this chapter and each application of the provisions of this chapter remain severable . . . .

25 Tex. Admin. Code § 139.9(b). The plaintiffs refuse to acknowledge this severability requirement, and insist on treating the State's ASC rules as a non-severable package that stands or falls together. But state-law severability provisions are binding on federal courts—especially in abortion cases. *See Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996) (per curiam) ("Severability is of course a matter of state law."). And the plaintiffs can seek injunctive relief *only* against the discrete provisions of the ASC rules that will cause clinics to close or unduly burden abortion patients. Resp. Br. 51–52.

Many of the requirements in the State's ASC rules cannot possibly be characterized as unconstitutional "undue burdens." *See, e.g.*, 25 Tex. Admin. Code § 135.5(a) ("Patients shall be treated with respect, consideration, and dignity."); *id.* § 135.5(c) (protections for patient medical records); *id.* § 135.5(g) ("Marketing or advertising regarding the competence and/or capabilities of the organization shall not be misleading to patients."); *id.* § 135.10(c) ("Facilities shall be clean and properly maintained."); *id.* § 135.52(e)(1)(F) (requiring "[a] liquid or foam soap dispenser" at "each hand washing facility"); *id.* § 135.52(e)(1)(H) (requiring signs "to identify [restrooms] for public, staff, or patient use"); *id.* § 135.52(h)(4) (prohibiting asbestos-tainted insulation); *id.* § 135.52(i)(1)(A) ("All fixtures, switches, [and] sockets

. . shall be maintained in a safe and working condition.").

Yet the plaintiffs think they can invalidate *all* of these rules, simply because some *other* provision in the State's ASC rules might cause clinics to close or unduly burden abortion access. The severability clause does not permit that relief—and neither do the precedents of this Court. *See Leavitt*, 518 U.S. at 139-40; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 & n.14 (1985); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (holding that a state court's "decision as to the severability of a provision is conclusive upon this Court.").

The plaintiffs have not asked this Court to overrule its cases that require courts to enforce state-law severability provisions. Indeed, their brief not even contest the court of appeals' decision to enforce HB2's severability requirements—thereby waiving any objections to the enforceability of section 139.9(b). Resp. Br. 51. The plaintiffs have likewise waived any objections to the fifth circuit's decision to sever the "operating requirements" of the State's ASC rules and allow those rules to take effect statewide. *Id.*; Pet. App. 69a–71a. The plaintiffs' only response to HB2's severability provisions has been to ignore them.

The plaintiffs appear to be hoping that this Court will grant an overbroad remedy—perhaps an injunction against *all* of section 135.52, or an injunction against all of the "physical plant" requirements in sections 135.51–135.56, or even an injunction against all of the ASC requirements—because the plaintiffs have chosen to ignore the severability requirement in section 139.9(b).

The plaintiffs cannot continue in this state of denial now that the court of appeals has enforced section 139.9(b), as required by this Court's decision in *Leavitt*. The plaintiffs must explain how *each discrete requirement* in the ASC rules imposes "undue burdens" on abortion patients. And they must limit their requested relief to the specific provisions that will cause abortion clinics to close.

F. The Plaintiffs' Claim That HB2's Admitting-Privileges Law Forced Abortion Clinics To "Operate At Diminished Capacity" Is Unsupported By Any Evidence

The plaintiffs claim that after the admitting-privileges law took effect on October 31, 2013, "many of those [abortion clinics] that remained were forced to operate at diminished capacity because the admitting-privileges requirement prevented some of their physicians from continuing to provide services." Pet. Br. 23. This claim is unsupported by *any* citation of anything inside or outside the record, and the amici have reviewed the trial record and found nothing that could corroborate this claim. *See also* Resp. Br. 9–11, 17, 42. A plaintiff—who bears the burden of proof on every disputed question of fact—cannot simply assert or make up facts on appeal that are not in the record of a case.

Worse, the plaintiffs do not identify *which* clinics operated at "diminished capacity." That makes it impossible for anyone—including this Court—to verify or investigate this unsupported claim. Yet the plaintiffs think they can simply assert this and have it treated as established fact.

Finally, the plaintiffs do not deny or contest the court of appeals' conclusion that they failed to introduce *any* evidence on the capacity of Texas abortion clinics. Pet. App. 56a ("[T]he record lacks any actual evidence regarding the current or future capacity of the [ASC] clinics." (citation omitted)); Pet. App. 57a ("[T]here does not appear to be any evidence in the record that the current ASCs are operating at full capacity or that they cannot increase capacity."); Pet. App. 67a n.42 ("Dr. Grossman's testimony on the capacity of remaining ASC abortion facilities is *ipse dixit*, and the record lacks evidence on this subject.").

G. The Plaintiffs' Claim That The Admitting-Privileges Law Has Prevented Women From Obtaining Abortions Is Unsupported By Any Evidence

The plaintiffs failed to produce any evidence that *any* patient in Texas was unable to obtain an abortion after the admitting-privileges law took effect on October 31, 2013—or that any patient encountered "substantial obstacles" in doing so. And the district court made no finding that this has occurred.

Amy Hagstrom Miller (the President/CEO of Whole Woman's Health) provided vague, hearsay anecdotes about patients who declined referrals to Whole Woman's Health's San Antonio clinic. J.A. 721–22. But Hagstrom Miller does not know (and did not testify) whether these unnamed patients obtained abortions in Corpus Christi or Houston or elsewhere, nor does she have any knowledge of whether they encountered substantial obstacles in those efforts.

The plaintiffs' allegations of a rise in self-induced abortion are likewise unsupported by evidence, and the district court made no finding that this has occurred. Hagstrom Miller's claim that her McAllen staff reported a "significant increase" in attempted self-abortions after HB2 took effect is double hearsay and cannot supply a basis for judicial factfinding. J.A. 721.

H. The Plaintiffs' Claim That The State's ASC Rules Treat Abortion Clinics Differently From Other ASCs Is False And Was Rejected By The Court Of Appeals

The plaintiffs' brief before this Court repeats a falsehood that they have asserted throughout this litigation: That the State's ASC rules discriminate against abortion providers by refusing to allow "grandfathering" and "waivers" that are supposedly available to other ASCs. Pet. Br. 7. The court of appeals rejected this claim, and rightly so. Pet. App. 45a. Abortion clinics are treated no differently from any other medical building seeking to be licensed as an ASC.

No medical building in Texas gets exempted from an ASC licensing requirement because it happened to be in use before it sought to obtain an ASC license. There is one provision of the Texas Administrative Code that exempts *previously licensed ASCs* from complying with changes to the ASC construction requirements adopted on June 18, 2009. *See* 25 Tex. Admin. Code § 135.51(a). But this grandfathering provision applies equally to abortion-clinic ASCs and non-abortion ASCs—so long as those abortion clinics were licensed as ASCs before June 18, 2009. The State does not require *previously li-*

censed ASCs to tear down their previously approved buildings and construct new ones whenever the State tweaks provisions in the ASC building code. And the State has exempted the abortion clinics that obtained ASC licenses before June 18, 2009, from the 2009 construction requirements—just as it exempts every other previously licensed ASC in the State from those requirements.[9]

At the same time, *every* building in Texas (including abortion clinics) that seeks to be licensed as an ASC after June 18, 2009, must comply with the post-2009 requirements. The State never exempts a building from its ASC requirements simply because it was used for medical purposes before it sought an ASC license.

II. THE TXPEP STUDIES WERE NOT INTRODUCED AT TRIAL AND CANNOT BE CONSIDERED BY THIS COURT

The plaintiffs' brief declares that abortion patients in Texas have to wait to schedule an abortion, but it does not cite any evidence in the record to support this claim. Instead, it cites a *post-trial* study conducted by the Texas Policy Evaluation Project (TexPEP)—whose researchers served as the plaintiffs' expert witnesses in

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[9] DSHS did not incorporate 25 Texas Administrative Code § 135.51(a) into the abortion-facility regulations because those regulations apply only to *licensed abortion clinics* that must now meet ASC standards. Abortion clinics licensed as ASCs are directly governed by the ASC rules in 25 Texas Administrative Code ch. 135 and fully subject to section 135.51(a)(1)'s exemption.

both of their lawsuits against HB2. J.A. 225, 227 (Grossman); J.A. 409–11 (Potter).[10]

The petitioners' brief does not tell this Court that the TexPEP study was never introduced at trial. But it wasn't—and it couldn't have been part of the trial record because the study was published more than a year after the trial ended. Pet. Br. 26 (TexPEP study dated November 25, 2015). The petitioners' attempt to influence this Court with outside-the-record hearsay produced by their expert witnesses is patently improper.

Federal courts are forbidden to consider outside-the-record evidence when resolving disputed questions of fact. There are limited exceptions to this rule—such as facts subject to judicial notice—but none of those exceptions apply here. *See infra* at 28–31. Litigants challenging abortion laws are not an exception to this rule.

This Court has repeatedly and consistently held that it is powerless to consider outside-the-record hearsay such as the TexPEP study. Indeed, this Court refuses to consider non-record evidence of this sort even when it takes the form of a sworn affidavit. In *Russell v. Southard*, 53 U.S. (12 How.) 139 (1851), the appellee attempted to submit affidavits concerning "new and material evidence" that was "discovered since the case was

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[10] TexPEP tries to show itself as a disinterested researcher, but it isn't. Not only have its researchers served as the the plaintiffs' expert witnesses, but one of those researchers, Grossman, is an abortion doctor who has co-authored an article with Stephanie Toti, the lead counsel for the plaintiffs in this litigation. J.A. 1282–83; *see also* http://bit.ly/10fwfzI (last visited Jan. 26, 2016).

heard and decided" in the circuit court. *Id.* at 159. This Court would have none of it:

> It is very clear that affidavits of newly-discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal.

Id.; *see also Hopt v. Utah*, 114 U.S. 488, 491–92 (1885) ("The lawfulness of the conviction and sentence of the defendants is to be determined by the formal record . . . and not by ex parte affidavits . . "); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990) ("[W]e may not rely on the city's affidavit, because it is evidence first introduced to this Court and is not in the record of the proceedings below." (citation omitted)).

The Court has been equally unyielding when litigants attempt to supplement the trial record with *unsworn* hearsay such as the TexPEP study. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the respondent attempted to lodge an "unsworn statement" from one of its employees that had "den[ied] any contact with the police on the day in question." *Id.* at 157 n.16. This Court brusquely refused to consider it:

> Apart from the fact that the statement is unsworn, *see* Fed. Rule Civ. Proc. 56(e), the statement itself is not in the record of the proceedings below and therefore could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case.

Id.; *see also New Haven Inclusion Cases*, 399 U.S. 392, 450, n.66 (1970) (refusing to consider "newspaper articles" cited by litigants in support of their claims because "[n]one of this is record evidence"); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486, n.3 (1986) (refusing to consider "facts not part of the record before us" because "this Court must affirm or reverse upon the case as it appears in the record").

Litigants before this Court also have a duty to refrain from invoking outside-the-record hearsay that can prejudice this Court's consideration of a case. As the leading treatise on Supreme Court practice explains:

> The entire system of determining disputes by trial before a court rests on the assumption that decisions must be based on the evidence submitted to (and held admissible by) the court and nothing else. In the normal situation, attempts to rely on nonrecord facts in appellate courts are unprofessional conduct.

S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* 743 (10th ed. 2013); *id.* at 801 ("It is manifestly improper to bring such [nonrecord] facts to the Court's attention, either by brief or

oral argument, to induce the Court to make a favorable disposition of the case.").

This behavior is considered "unprofessional" and "manifestly improper" for several reasons. First, it violates the Federal Rules of Evidence and the protections that it establishes for opposing litigants. Rule 802 excludes hearsay to ensure that each side's evidence is sworn and subjected to cross-examination. And Rule 702 requires a district court to act as gatekeeper for evidence and testimony prepared by experts. *See Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993). The plaintiffs could never have introduced the TexPEP study into the record of this case without first satisfying the district court that the study's conclusions are reasoned, based on reliable principles and methods, and founded on sufficient facts or data—and only *after* the State has had the opportunity to take discovery from the study's authors and challenge their methodology in a *Daubert* motion. *See id.*, Fed. R. Evid. 702. Yet the plaintiffs think they can evade all of these safeguards by touting the TexPEP study in an appellate brief and expecting this Court to treat it as established fact.

The State of Texas did not have the opportunity to depose or cross-examine the authors of the TexPEP study. Nor has any Court has examined the data and evidence on which the study's conclusions rely. And the study is of course unsworn. It is unacceptable for the plaintiffs to spring this material for the first time in an appellate brief.

This is not to say that litigants and courts may never rely on facts outside the record. There are well-

established exceptions to the prohibition on outside-the-record evidence—and none of those exceptions apply to the TexPEP study.

The first exception is for facts subject to judicial notice. *See* Fed. R. Evid. 201; *Daubert*, 509 U.S. at 592 n.11; *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* 744 (10th ed. 2013) ("Facts that are subject to judicial notice constitute a well-recognized exception to the general rule."). These facts are defined in Rule 201(b) of the Federal Rules of Evidence, which provides:

> The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b). Many of the non-record sources in this case qualify for judicial notice—such as the Kermit Gosnell grand-jury report, on which the State and its amici rely. Resp. Br. 1. The legislative record of HB2 is also appropriate for judicial notice, especially as it relates to the legislature's "purpose" in enacting HB2. Resp. Br. 34–35, 39–40.

The TexPEP study does not qualify for judicial notice, and the plaintiffs do not argue that it does. Its claims are not "generally known," nor can they "be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). TexPEP has not produced audio of the "mystery calls" that it allegedly placed to abortion clinics, and

there is no way to verify whether these calls actually happened. TexPEP does not even identify the clinics that had the allegedly long waiting times. The study that appears on the internet is hearsay about hearsay.

Second, courts may consider outside-the-record evidence when conducting rational-basis review. *See Muller v. Oregon*, 208 U.S. 412, 419 & n.1 (1908); Mary Ann Glendon, *Comparative Law in the Age of Globalization*, 52 Duq. L. Rev. 1, 12–13 (2014) ("In the landmark case of *Muller v. Oregon*, the Supreme Court accepted references from a Brandeis brief as evidence that Oregon's legislation on the working hours of women had a rational basis."). In these situations, the courts are *not* consulting non-record evidence to resolve a disputed question of adjudicative fact. Quite the contrary: Under rational-basis review, a legislative decision "is not subject to courtroom factfinding" and "may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Courts may, however, look outside the record to see if there is any *conceivable* basis for a legislative decision, and litigants defending a law on rational-basis review may invoke non-record evidence to establish a conceivable justification for the law. *See id.* ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." (citation omitted).[11]

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[11] *See also* Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 Duq. L. Rev. 51, 55 n.25 (2013) ("Brandeis's claim in *Muller* was not that restricting women's working hours to (continued...)

The jurisprudence of this Court requires that state abortion regulations have a rational basis and refrain from imposing "undue burdens." *See Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."). It is therefore appropriate for this Court to consider outside-the-record evidence—such as the Gosnell grand-jury report—in determining whether HB2 is rationally related to protecting abortion patients and their unborn children.

The final exception is for facts relating to mootness. Counsel have a duty to alert this Court to any factual developments that may affect the jurisdiction of this Court—regardless of whether those facts are included in the trial record. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997); *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam); *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* 745, 800 (10th ed. 2013).

The plaintiffs did this in the first HB2 lawsuit, when they candidly informed this Court that the Planned

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ten hours per day was necessarily correct, but only that Oregon's decision to do so was at least reasonable. Brandeis asked the Supreme Court to take judicial notice of the fact that there was 'reasonable ground' for Oregon's decision.").

Parenthood Women's Health Center in Lubbock had closed for reasons unrelated to HB2—a development that mooted that clinic's claims against the State and altered the data on which the plaintiffs' expert had relied. *See* Emergency Application to Vacate Stay at 7 n.3, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 4, 2013) ("Planned Parenthood Women's Health Center ... has withdrawn from this litigation, and it is Applicants' understanding that abortion services will not be available in Lubbock even if this application is granted.").[12]

The TexPEP study does not fall within any of these exceptions, and the plaintiffs do not even argue that it qualifies for judicial notice. For the plaintiffs even to mention this hearsay in their brief is an improper attempt to sway this Court with inadmissible evidence.

III. THE PLAINTIFFS MADE FALSE PREDICTIONS TO THIS COURT ABOUT THE EFFECTS OF HB2 IN THE PREVIOUS LAWSUIT

The plaintiffs expect this Court to believe everything they say about the effects of HB2. But the plaintiffs, their attorneys, and their experts have a history of making dire and unsupported claims about abortion regulations that never materialize after the challenged law takes effect.

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[12] In this lawsuit, by contrast, the plaintiffs want this Court to believe that the Lubbock clinic closed because of HB2. Pet. Br. 52 n.22, App 1.

In their previous lawsuit over HB2, the plaintiffs sought facial invalidation of the State's admitting-privileges requirement. The district court enjoined the law, but the fifth circuit stayed the injunction pending appeal. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013). The plaintiffs then filed an emergency application asking this Court to vacate the fifth circuit's stay. *See* Emergency Application to Vacate Stay, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 4, 2013). The plaintiffs told this Court that the admitting-privileges law:

- "will prevent, each year, approximately 20,000 Texas women who would have otherwise had an abortion from accessing this constitutionally protected health care service." *Id.* at 2; *see also id.* at 8 (same claim).
- would cause the ASC abortion providers in Austin and Fort Worth, and the non-ASC clinic in Killeen to permanently discontinue abortion services. *Id.* at 7–8.
- "would have an unprecedented and devastating effect on women's abilities to obtain an abortion." *Id.* at 1–2.

But this Court denied emergency relief, and the admitting-privileges law has been in effect since October 31, 2013.

Now that the admitting-privileges law has taken effect, the claims that the plaintiffs made to this Court have been discredited. The admitting-privileges law has

not prevented 20,000 women in Texas each year from obtaining abortions—and the plaintiffs' expert admitted this at trial. J.A. 415. The plaintiffs did not even allege in this case that *any* patient had been turned away from an abortion clinic on account of insufficient capacity—even though they had insisted before this Court that the admitting-privileges law *would* (not might) leave 20,000 women in Texas each year with no place to get an abortion.

The abortion-clinic closures that the plaintiffs and their experts had predicted also did not come to pass. The ASC abortion providers in Austin and Fort Worth each remained open—as did the non-ASC clinic in Killeen—because their doctors were able to secure the required admitting privileges. Yet the plaintiffs told this Court that all three of those clinics *would* close if it allowed the admitting-privileges requirement to take effect. Now the plaintiffs expect this Court to accept all of their factual claims in their pre-enforcement challenge to HB2's ASC requirement—after their claims before this Court in the first HB2 lawsuit have been proven false.

This is precisely why pre-enforcement facial challenges to abortion laws are disfavored. *See Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007). The plaintiffs bear the burden of proof, and it is not possible to obtain reliable evidence proving that a law such as HB2's admitting-privileges or ASC requirements will impose "undue burdens" or "substantial obstacles" on a large fraction of abortion patients before the law takes effect. The proper response is not to invalidate abortion laws based on speculation and unreliable hearsay allegations, but to re-

ject the plaintiffs' pre-enforcement facial challenge and consider constitutional challenges after the effects of the law can be accurately measured. *See id.*; *see also A Woman's Choice–East Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) ("[I]t is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate.").

IV THE MAP ATTACHED TO THE PETITIONERS' BRIEF IS DISINGENUOUS AND INACCURATE

The map attached to the petitioners' brief shows the locations of 41 abortion providers throughout Texas, and implies that HB2 has caused or will cause all but nine of them to close. Pet. Br. App. 1 ("Impact of HB2 on the Geographic Distribution of Abortion Facilities in Texas."). The map is false and misleading in numerous respects.

First, the clinics in Abilene, College Station, Lubbock, Midland, San Angelo, Sugar Land, Stafford, and All Women's Medical Center in San Antonio each closed before HB2 took effect—and their closures were unrelated to HB2. *See supra*, at 7–10. Abilene and Sugar Land closed months before HB2 was even enacted. And the clinics in Beaumont, Corpus Christi, and Killeen closed after the admitting-privileges law took effect and have remained closed even though the ASC requirement has been enjoined since August 2014. *See supra*, at 11–12. All of these 11 clinics (with the possible exception of

Killeen)[13] would have closed and remained closed even if HB2 had never been enacted; they are not clinics "impacted" by HB2.

Second, the plaintiffs' map contradicts the testimony that they presented to the district court. The map attached to the plaintiffs' brief shows 41 abortion clinics—including Abilene and Sugar Land, which closed before HB2 was even signed, and including two new ASC providers that Planned Parenthood recently opened in Dallas and San Antonio.

The plaintiffs' expert, however, testified that 41 abortion existed in Texas in May 2013—but he *excluded* Abilene and Sugar Land (which had already closed), as well as the ASCs that opened later in Dallas and San Antonio. J.A. 229–30. That means there are four abortion clinics that the plaintiffs have excluded from their map. Two of those missing clinics are in Dallas. *Compare* J.A. 229 (five abortion clinics in Dallas) *with* Pet. Br. App. 1 (three abortion clinics in Dallas plus the new Planned Parenthood ASC). The other two are in Houston. *Compare* J.A. 229 (ten abortion clinics in Houston) *with* Pet. Br. App. 1 (eight).

We have been unable to determine which abortion clinics the plaintiffs have omitted from their map. Nor can we determine *why* the plaintiffs would leave four of the State's abortion clinics off their map, which would seem to hurt rather than help their factual case against HB2. Perhaps this was simply an oversight by the plain-

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[13] *See supra*, at 12.

tiffs' lawyers. Or perhaps the plaintiffs have a valid reason for excluding those four abortion clinics that they can explain in their reply brief. Whatever the reason, the plaintiffs' map is inaccurate and contradicts their representations to the district court—and is yet another example of why the Court cannot trust the plaintiffs' representations of the record in this case.

* * *

This Court is rightly reluctant to take cases that involve fact-bound error correction. The factual disputes in this case are numerous and cannot be resolved simply by accepting the inaccurate and unsupported assertions in the plaintiffs' brief. We respectfully ask the Court to consider carefully what the trial record says—and, more importantly, what it does *not* say—about the effects of HB2.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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